

IN THE  
SUPREME COURT OF MISSOURI

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CODEY SMITH,	)	
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	)	
vs.	)	No. SC 92127
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STATE OF MISSOURI,	)	
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APPEAL FROM THE CIRCUIT COURT OF  
BARTON COUNTY, MISSOURI  
TWENTY-EIGHTH JUDICIAL CIRCUIT  
THE HONORABLE JAMES R. BICKEL, JUDGE

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RESPONDENT'S SUBSTITUTE BRIEF

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Mark A. Grothoff, MOBar #36612  
Attorney for Respondent  
1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
(573) 882-9855/FAX (573) 882-9468  
E-Mail: Mark.Grothoff@mspd.mo.gov

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### **JURISDICTIONAL STATEMENT**

This appeal arises from the granting of respondent's Rule 29.15 motion after an evidentiary hearing in the Circuit Court of Barton County, Missouri, the Honorable James R. Bickel presiding. Following an opinion by the Southern District Court of Appeals reversing the motion court's judgment, this case was transferred to this Court by this Court's order upon respondent's application for transfer. Thus, jurisdiction lies in this Court. Article V, Section 10, Missouri Constitution; Supreme Court Rule 83.04.

## **STATEMENT OF FACTS**

Respondent was charged by information with robbery in the first degree and armed criminal action for the armed robbery of the “Fisca” convenience store in Asbury, Missouri (L.F. 12-13).<sup>1</sup> The case proceeded to trial before a jury on October 15, 2008 (Tr. 1). The following evidence was adduced at trial.

Gayla Keller was working at the “Fisca” store around 8:00 p.m. on August 30, 2006 (Tr. 196-197). Another employee, Brett Colyer, was also there (Tr. 197). Keller had her back to the door when she heard a man say, “Give me all your money now and I am not kidding!” (Tr. 198). She turned around and saw two men with guns, standing just inside the door (Tr. 198). Keller said Colyer thought at first that it was a couple of his friends playing a joke, but they told him that they were not kidding and to get all the money from the register (Tr. 199). Colyer went to comply and about the time he opened the register, one of the men fired a shot, and “barely missed him.” (Tr. 199). Keller said Colyer was getting ready to open

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<sup>1</sup> The record on appeal will be cited as follows: the transcript from respondent’s trial will be (Tr.); the transcript from respondent’s sentencing will be (S.Tr.); the legal file from respondent’s direct appeal will be (L.F.); the transcript from the evidentiary hearing on respondent’s post-conviction motion will be (PCR Tr.); and the legal file for this appeal of respondent’s post-conviction motion will be (PCR L.F.).

the register when the man fired (Tr. 200). Colyer gave the men all of the money from the cash register, approximately \$700 (Tr. 199-200).

The men went out the door and drove away in a red “dually” truck, turning south on the state line dirt road (Tr. 204). The clerks then pushed their “panic” button and officers soon arrived (Tr. 204). Keller was able to get the license number of the truck (Tr. 212).

Israel Freeland was in the Barton County jail, charged with forcible rape, forcible sodomy, the Class B felony of theft, a Class C theft charge, second-degree assault, and victim tampering (Tr. 166-168). In January, 2007, Freeland spoke to Sheriff’s Deputy Pam Miller, telling her that he “might have” some information about other crimes (Tr. 186, 230-231, 242). Freeland first said that he approached her, then he said he could not remember whether she sought him out (Tr. 186). Deputy Miller told him that he had to speak to his attorney (Tr. 242). After his attorney negotiated a deal, Freeland, with his attorney present, gave Deputy Miller a statement on January 4, 2007, which Deputy Miller recorded (Tr. 169, 186-187).

As a result of a plea agreement reached in his case, Freeland at the time of respondent’s trial was serving four concurrent seven-year sentences for four Class C felonies: sexual assault, deviate sexual assault, and two counts of stealing (Tr. 166-168). He had been facing punishment of from five years to life for each of the two sexual offenses, from five to fifteen years for each of two Class B felonies, and seven years for each Class C felony (Tr. 182-183). Freeland’s Missouri sentences were also being served concurrently with a ten-year sentence in Kansas

that he would complete after his release in Missouri (Tr. 184-185). As a condition of his bargain, Freeland was required to testify against respondent and if he failed to comply, the tampering and assault charges would be reinstated (Tr. 168-169).

Freeland said that he met respondent when they were in high school (Tr. 178-179). He was in the jail in October, 2006 when respondent arrived; Freeland said that respondent told him that he and Kyle Carroll committed a robbery of the “Fisca” store (Tr. 174-176). Freeland said that he was being taken out of the jail, due to an assault, on the day respondent arrived (Tr. 180). Respondent was still there when Freeland returned (Tr. 180). The Barton County Sheriff testified that his records did not show that Freeland left the jail because of a fight (Tr. 222).

The men were housed in separate pods, each having a dorm-style room that could hold up to eight inmates (Tr. 223-224). Inmates in separate pods could easily communicate (Tr. 225). The Sheriff noted that Kyle Carroll and Joshua Long - whose connection with the robbery was not stated, though the original charge lists him as acting with respondent (L.F. 12) - were not held in the Barton County jail during the relevant time (Tr. 259-260).

In September, 2006, several months before she talked to Freeland, Deputy Miller began to suspect respondent of being involved in the robbery (Tr. 241). She and Freeland both said that neither she nor anyone else gave Freeland any details of the robbery before Freeland spoke to Deputy Miller (Tr. 179-180, 187-188, 242-243). Freeland testified that he had heard about the robbery on the news before respondent told him of his involvement, but he had not heard any details



(Tr. 179-180). Freeland said he knew that the officers had a surveillance video of the robbery (Tr. 189-190). Deputy Miller said she had not told him about the video, but Freeland said at some point respondent told Freeland that he was called “out of the cell to look at some scars on his arms, apparently.” (Tr. 190, 248). During his recorded statement, Freeland was asked a question by Deputy Miller about the robbery and he responded, “you’ve seen the footage, I don’t know if that’s accurate” (Tr. 190).

Freeland testified respondent told him that they first stole a “dually” truck (meaning that it had four rear wheels) and drove it to the “Fisca” store (Tr. 173-174). They entered the store wearing t-shirts tied around their heads as disguises; both men had .22 rifles (Tr. 175-176). Freeland also testified that he told Deputy Miller that respondent said that there was one clerk and an elderly couple in the store (Tr. 176). Freeland did not mention such a couple in his recorded statement (Tr. 249-50). According to Freeland, when the clerk kind of smirked, thinking it was a joke, respondent fired a shot to demonstrate that he was serious (Tr. 175). Freeland also told Deputy Miller that respondent said that he was dressed all in black (Tr. 176, 189, 244). The surveillance video from the store showed that the man whom Deputy Miller believed to be respondent wore blue jeans and a white t-shirt; the only thing he wore that was black was the t-shirt on his head (Tr. 244-245, 251). Respondent told Freeland that they took \$600 to \$700 from the store (Tr. 176).

Freeland testified that respondent told him that when they left the store they drove down a back road to a “strip pit” near Cherokee, Kansas, where they dumped the stolen truck (Tr. 177-178). In the recorded statement, Freeland told Deputy Miller that he did not know the direction they went (Tr. 246). He did not say that they took back roads or that they drove down the state line road (Tr. 246).

Freeland had always known the area of the strip pit as “the Cliff”; he and others had frequently gone swimming there when he was younger (Tr. 178). The information was not sufficient for Deputy Miller to locate the truck; a couple of weeks later, she received a detailed map from a person she did not identify that allowed the officers to recover the vehicle, though they could not do so until September, 2007 because of the weather and muddy conditions at “the Cliff” (Tr. 231-232). The license number on the truck it matched the one on the truck used in the robbery (Tr. 239-240). The officers did not find a weapon in or around the truck (Tr. 240, 257-258).

Deputy Miller was asked why she enlisted the aid of the Crawford County, Kansas Sheriff’s Office and she said, “At that time, we were investigating a series of thefts in both Crawford, Cherokee, and Barton County. We believed that this group of individuals were probably involved. I had asked for the assistance of Crawford County. We all got a Task Force together.” (Tr. 252). She went on to say that she enlisted their help in locating the truck because she was not familiar with the area in which it had been abandoned (Tr. 252).

After nearly three hours of deliberations and after announcing that it was having trouble reaching a decision, the jury found respondent guilty on both counts (Tr. 296-299; L.F. 41-42). On December 8, 2008, respondent was sentenced to concurrent prison terms of sixteen and five years, respectively (S.Tr. 10; L.F. 48-49).

On December 11, 2008, respondent filed a notice of appeal of his convictions (L.F. 51-52). On September 28, 2009, this Court issued an opinion affirming respondent's convictions. State v. Smith, 293 S.W.3d 149 (Mo. App. S.D. 2009). This Court's mandate was issued on October 14, 2009 (PCR L.F. 5).

On December 28, 2009, respondent filed a pro se motion to vacate, set aside or correct his judgment or sentence (PCR L.F. 1, 4-15). On March 31, 2010, respondent's counsel filed a statement in lieu of an amended motion (PCR L.F. 1, 21-23). Respondent's motion alleged, inter alia, that respondent received ineffective assistance of counsel in that his trial counsel failed to call as a witness Kyle Carroll, who would have testified that respondent was not his accomplice in the robbery (PCR L.F. 10-11, 13).

On November 2, 2010, an evidentiary was held concerning respondent's post-conviction motion (PCR Tr. 1). Testifying at the hearing were Israel Freeland (PCR Tr. 6), Kyle Carroll (PCR Tr. 17), respondent (PCR Tr. 25), and William Fleischaker (PCR Tr. 35).

Israel Freeland testified that he had lied when testifying against respondent at trial (PCR Tr. 10, 13-14). He now denied that respondent confessed to his

involvement in the robbery and stated that he had learned the details from others (PCR Tr. 10-11). He was willing to face the consequences for lying but needed to correct the harm of his prior testimony (PCR Tr. 14-16).

Respondent testified that he asked his trial counsel to investigate the possibility of Carroll testifying (PCR Tr. 28). Respondent stated that he thought Carroll would give candid and truthful testimony about the robbery, and that Carroll's testimony might help him (PCR Tr. 28).

Kyle Carroll testified that he was serving a ten-year prison sentence after pleading guilty to robbery in the first degree for the robbery of the "Fisca" store (PCR Tr. 17-18). Carroll stated that he had known respondent for about ten years (PCR Tr. 19). He also testified that respondent was not involved in the robbery of the "Fisca" store (PCR Tr. 19, 60). Carroll further testified that he had never told anyone who had helped him rob the store, and that, as far as he knew, that person had never been convicted (PCR Tr. 19-20).

Carroll entered his guilty plea on September 17, 2007 (PCR Tr. 21). He said that he learned in early 2008 that respondent had been charged in connection with the robbery (PCR Tr. 20). Carroll testified that he was never contacted by anyone purporting to represent respondent (PCR Tr. 21-22). Carroll also testified that if he had been called to testify at respondent's trial, he would have stated that respondent was not with him during the robbery (PCR Tr. 21).

On cross-examination, Carroll refused to name the person who had been his accomplice in the robbery (PCR Tr. 23). The court ordered Carroll to answer the

question and advised him that he could face criminal contempt charges for refusing, but he still refused to answer (PCR Tr. 23-24). Carroll also stated that, if he had testified at respondent's trial, he would have refused to name his accomplice (PCR Tr. 24). Carroll acknowledged that he did not know if the jury would have believed his testimony (PCR Tr. 24).

The state introduced into evidence a letter received by the prosecutor's office that was dated June 9, 2008, and was signed by Carroll (PCR L.F. 24). The letter read:

*I was wondering if I could get a sentence reduction, if I help get another conviction on the Fisca robbery. I was charged with it back in Sept 17, 07 and got 10 years for robbery in the 1<sup>st</sup> class A felony an now I'm charged with the vehical that was stolin from Crawford Co, KS also if you look at the evidence, I didn't point my gun at anybody an didn't fire the shot. I was high on dope, an know that I done a very wrong thing, but nobody can take the blame for what I done. but I don't think that I should take all the blam. Well if you would please send Pam Miller over to Crawford Co jail I'd like to talk to her. an maybe we can work out a deal.*

(PCR L.F. 24). Carroll denied at the evidentiary hearing that he was offering in the letter to assist the prosecution in obtaining the conviction of anyone else for the robbery (PCR Tr. 60). Carroll stated that the purpose of the letter was to seek a sentence reduction because he had never been convicted of a crime before, and if

he was going to assist the prosecution, he would have done it from the beginning of his case (PCR Tr. 58-60).

William Fleischaker testified that he did not call Kyle Carroll as a witness because Carroll had written a letter that he believed was offering to assist the prosecution and he did not know what Carroll was going to say; his testimony could have been harmful (PCR Tr. 42-43, 47). Fleischaker stated that his basic trial strategy was to get the jury to disbelieve Israel Freeland by convincing the jury that his testimony was bought and paid for by getting a plea deal that involved the dismissal of sex offense charges that he was facing (PCR Tr. 43-44).

Fleischaker also testified on cross-examination that he never had any discussions with Carroll and never made any attempts to contact him (PCR Tr. 45).

Fleischaker stated that he was aware that Carroll had pled guilty to the robbery, and had some recollection that Carroll had declined to identify his accomplice. (PCR Tr. 45).

On November 10, 2010, the motion court issued findings of fact and conclusions of law granting respondent's motion for post-conviction relief (PCR L.F. 30-37). Within the motion court's judgment, the motion court made the following findings:

*Claim (g) alleges that trial counsel failed to call Kyle Carroll to testify at trial, stating that Mr. Carroll would testify that Movant was not his accomplice to the robbery. Undisputed evidence indicates Mr. Carroll was never contacted by Movant's trial counsel. The Court finds Mr. Carroll to*

*be a credible witness. Trial counsel purported to have a strategy for not contacting Mr. Carroll prior to trial, however, his explanation is based purely on speculation. Movant has established that his trial counsel was aware of Mr. Carroll, the witness could have been located, Mr. Carroll would have testified if called, and his testimony would aided Movant's defense. Had Movant's trial counsel contacted Mr. Carroll, he could have then formulated a reasonable strategy regarding whether or not Mr. Carroll should be called as a witness.*

\* \* \* \*

*Here Movant's trial counsel failed to investigate the prospective testimony of Kyle Carroll and merely speculated as to what that testimony might be. He could not formulate a reasonable strategy without first investigating Mr. Carroll as a possible witness at trial. This failure prejudiced Movant because had Mr. Carroll testified at trial, there is a reasonable probability of a different outcome.*

(PCR L.F. 35-37). On November 12, 2010, the state filed a notice of appeal to this Court (PCR L.F. 39).

On appeal, the Missouri Court of Appeals, Southern District reversed the motion court's judgment, and remanded with directions to enter a judgment denying all relief. Smith v. State, No. SD 30971, 2011 WL 4796129 (Mo. App. S.D. 2011).

Respondent filed an application for transfer to this Court. On January 31, 2012, this Court sustained appellant's application for transfer, and transferred this case to this Court.



## **ARGUMENT**

### **I.**

**The motion court did not clearly err in granting respondent's Rule 29.15 motion in that the court based its ruling on the finding that respondent was denied effective assistance of counsel by his counsel's failure to call Kyle Carroll as a witness, and the discussion of counsel's failure to investigate Carroll's testimony was only in response to, and in the context of, the reasonableness of trial counsel's stated strategy for not calling Carroll as a witness.**

The scope of appellate review of a Rule 29.15 motion is whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

In its first Point, the state alleged that the court based its judgment on counsel's failure to conduct an investigation of Kyle Carroll's potential testimony, which according to the state, was not within the claims pled in respondent's post-conviction motion. As noted by the state, Missouri is a fact pleading state and pleading defects cannot be remedied by refining the claim or by presenting evidence at a hearing. State v. Harris, 870 S.W.2d 798, 815 (Mo. banc 1994).

However, the state's reading of the findings is faulty. The motion court's ruling was based on his counsel's failure to call Kyle Carroll as a witness. The court discussed counsel's failure to investigate Carroll's testimony only in the context of the reasonableness of counsel's stated strategy.

Respondent's post-conviction motion alleged, in part, that respondent received ineffective assistance of counsel in that his trial counsel failed to call as a witness Kyle Carroll, who would have testified that respondent was not his accomplice in the robbery (PCR L.F. 10-11). Within the motion, respondent also challenged his counsel's strategy regarding Carroll (PCR L.F. 13).

At the evidentiary hearing, respondent's counsel testified that he did not call Kyle Carroll as a witness because he did not know what Carroll was going to say and he thought his testimony could have been harmful (PCR Tr. 42-43, 47). Counsel also testified that he never had any discussions with Carroll and never made any attempts to contact him (PCR Tr. 45).

A claim of ineffective assistance of counsel must meet a two-pronged standard. Under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), a movant must show that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under the same or similar circumstances, and that this deficiency prejudiced his defense. Id. Prejudice is shown when there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

To establish ineffective assistance of counsel for failure to present a witness, a movant must show that the witness would have testified if called, and that the witness' testimony would have aided the defense. Hatcher v. State, 4 S.W.3d 145, 150 (Mo. App. S.D. 1999). Moreover, a post-conviction movant must overcome the presumption that counsel's decision was a matter of sound trial strategy under the circumstances at the time the decision was made. Zink v. State, 278 S.W.3d 170, 176 (Mo. banc 2009).

Within the motion court's judgment, the motion court made the following findings:

*Claim (g) alleges that trial counsel failed to call Kyle Carroll to testify at trial, stating that Mr. Carroll would testify that Movant was not his accomplice to the robbery. Undisputed evidence indicates Mr. Carroll was never contacted by Movant's trial counsel. The Court finds Mr. Carroll to be a credible witness. Trial counsel purported to have a strategy for not contacting Mr. Carroll prior to trial, however, his explanation is based purely on speculation. Movant has established that his trial counsel was aware of Mr. Carroll, the witness could have been located, Mr. Carroll would have testified if called, and his testimony would aided Movant's defense. Had Movant's trial counsel contacted Mr. Carroll, he could have then formulated a reasonable strategy regarding whether or not Mr. Carroll should be called as a witness.*

*In order for a post conviction Movant to prevail on a claim of ineffective assistance of counsel, the Movant must satisfy a two-prong test set forth in Strickland v. Washington 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). First, the Movant must establish his counsel did not conform to the degree of skill and diligence of a reasonably competent attorney; and secondly, his defense was prejudiced as a result. State v. Hall 955 S.W.2d 729, 746 (Mo banc 1997).*

*Trial counsel has a duty to investigate all aspects of his clients case, including the review of discovery, what witnesses to call and other matters of trial strategy. State v. Butler, 951 S.W. 2d 600, 608-610 (Mo. banc 1997); Cravens v. State, 50 S.W. 3d 290, 295 (Mo App S.D. 2001). Strategic choices can only be made after a thorough investigation. Strickland, 466 U.S. at 690, 104 S. Ct., at 2066. Counsel must be fully informed of the facts before formulating reasonable strategy when such facts are available through investigation, otherwise, counsel may be found to have provided ineffective assistance of counsel. See, Clay v. State, 954 S.W. 2d 344 (Mo.App. ED 1997).*

*Here Movant's trial counsel failed to investigate the prospective testimony of Kyle Carroll and merely speculated as to what that testimony might be. He could not formulate a reasonable strategy without first investigating Mr. Carroll as a possible witness at trial. This failure*

*prejudiced Movant because had Mr. Carroll testified at trial, there is a reasonable probability of a different outcome.*

(PCR L.F. 35-37) (emphasis added).

The motion court plainly based its judgment on counsel's failure to call Kyle Carroll as a witness meeting the standards for ineffective assistance of counsel: *Movant has established that his trial counsel was aware of Mr. Carroll, the witness could have been located, Mr. Carroll would have testified if called, and his testimony would aided Movant's defense . . . had Mr. Carroll testified at trial, there is a reasonable probability of a different outcome* (PCR L.F. 36-37). And just as clearly, the court's discussion of counsel's failure to investigate was made only in the context of the reasonableness of counsel's stated strategy for not calling Carroll as a witness. Thus, the state's reading of the court's findings is faulty and its claim that the court's judgment was based on a claim not in respondent's post-conviction motion is fallacious.

Respondent has established that the motion court based its ruling on the finding that respondent was denied effective assistance of counsel by his counsel's failure to call Kyle Carroll as a witness, and the discussion of counsel's failure to investigate Carroll's testimony was only in response to, and in the context of, the reasonableness of trial counsel's stated strategy for not calling Carroll as a witness. The motion court did not clearly err in granting respondent's Rule 29.15 motion. The state's claim is without merit and should be denied.

## ARGUMENT

### II.

**The motion court did not clearly err in granting respondent's Rule 29.15 motion in that respondent was denied effective assistance of counsel by his counsel's failure to call as a witness Kyle Carroll, who would have testified that respondent was not his accomplice in the robbery.**

The scope of appellate review of a Rule 29.15 motion is whether the findings of fact and conclusions of law are clearly erroneous. Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000). The motion court's determination is clearly erroneous when the appellate court has a definite and firm impression that a mistake has been made. Id. On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

A claim of ineffective assistance of counsel must meet a two-pronged standard. Under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), a movant must show that his counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under the same or similar circumstances, and that this deficiency prejudiced his defense. Id.; Sanders v. State, 738 S.W.2d 856, 867 (Mo. banc 1987). Prejudice is shown when there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is one sufficient to undermine confidence in the

outcome of the trial. Edwards v. State, 200 S.W.3d 500, 516 (Mo. banc 2006). In addition, a post-conviction movant must overcome the presumption that counsel's decision was a matter of sound trial strategy under the circumstances at the time the decision was made. Zink v. State, 278 S.W.3d 170, 176 (Mo. banc 2009).

Respondent was charged with robbery in the first degree and armed criminal action for the armed robbery of the "Fisca" convenience store in Asbury, Missouri (L.F. 12-13). The evidence at trial showed that two men robbed the "Fisca" store around 8:00 p.m. on August 30, 2006 (Tr. 196-212). Israel Freeland testified at trial that while he and respondent were being held in the Barton County Jail, respondent confessed to the "Fisca" store robbery (Tr. 173-178).<sup>2</sup>

Respondent did not present any evidence, and respondent was ultimately convicted of first-degree robbery and armed criminal action (Tr. 296-299; L.F. 41-42).

Respondent's post-conviction motion alleged, in part, that respondent received ineffective assistance of counsel in that his trial counsel failed to call as a witness Kyle Carroll, who would have testified that respondent was not his accomplice in the robbery (PCR L.F. 10-11). Within the motion, respondent also challenged his counsel's strategy regarding Carroll (PCR L.F. 13).

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<sup>2</sup> At the evidentiary hearing, though, Israel Freeland testified that he had lied when testifying against respondent at trial, and denied that respondent confessed to his involvement in the robbery (PCR Tr. 10-11, 13-14).

Prior to trial, respondent had asked his counsel to investigate the possibility of Kyle Carroll testifying (PCR Tr. 28). Respondent thought Carroll would give candid and truthful testimony about the robbery, and that Carroll's testimony might help him (PCR Tr. 28).

At the evidentiary hearing, Kyle Carroll testified that he was serving a ten-year prison sentence after pleading guilty to robbery in the first degree for the robbery of the "Fisca" store (PCR Tr. 17-18). Carroll stated that he had known respondent for about ten years (PCR Tr. 19). He also testified that respondent was not involved in the robbery of the "Fisca" store (PCR Tr. 19, 60). Carroll further testified that he had never told anyone who had helped him rob the store, and that, as far as he knew, that person had never been convicted (PCR Tr. 19-20).

Carroll entered his guilty plea on September 17, 2007 (PCR Tr. 21). He said that he learned in early 2008 that respondent had been charged in connection with the robbery (PCR Tr. 20). Carroll testified that he was never contacted by anyone purporting to represent respondent (PCR Tr. 21-22). Carroll also testified that if he had been called to testify at respondent's trial, he would have stated that respondent was not with him during the robbery (PCR Tr. 21).

Respondent's counsel testified at the evidentiary hearing that he did not call Kyle Carroll as a witness because he did not know what Carroll was going to say and he thought his testimony could have been harmful (PCR Tr. 42-43, 47). Counsel acknowledged that he never had any discussions with Carroll and never made any attempts to contact him (PCR Tr. 45).



Within the motion court's judgment, the motion court made the following findings:

*Undisputed evidence indicates Mr. Carroll was never contacted by Movant's trial counsel. The Court finds Mr. Carroll to be a credible witness. Trial counsel purported to have a strategy for not contacting Mr. Carroll prior to trial, however, his explanation is based purely on speculation. Movant has established that his trial counsel was aware of Mr. Carroll, the witness could have been located, Mr. Carroll would have testified if called, and his testimony would aided Movant's defense. Had Movant's trial counsel contacted Mr. Carroll, he could have then formulated a reasonable strategy regarding whether or not Mr. Carroll should be called as a witness.*

(PCR L.F. 35-36).

The motion court did not clearly err in granting respondent's motion on this claim. To establish ineffective assistance of counsel for failure to present a witness, respondent must show that the witness would have testified if called, and that the witness' testimony would have aided the defense. Hatcher v. State, 4 S.W.3d 145, 150 (Mo. App. S.D. 1999). Kyle Carroll clearly was willing and available to testify, and his testimony certainly would have aided respondent's defense. Carroll's testimony would have established with the jury that respondent was not involved in the robbery of the "Fisca" store; Carroll, who had pled guilty

to being one of the men who committed the robbery, would have told the jury directly that respondent was not his accomplice in the robbery.

Moreover, the motion court specifically found Carroll to be a credible witness (PCR L.F. 35). Witness credibility is a matter for the motion court to resolve, and the motion court may believe all, some, or none of the testimony of any witness, even if the witness' testimony is uncontradicted. Branson v. State, 145 S.W.3d 57, 61, n.9 (Mo. App. S.D. 2004). The motion court's credibility findings are entitled to deference. Berry v. State, 214 SW.3d 413, 417 (Mo. App. S.D. 2007). This Court "defer[s] to the determination of the trial court on issues of credibility." Branson, *supra*.

Reasonably competent counsel would have spoken to Kyle Carroll and would have called him as a witness. Carroll's testimony was readily discoverable with reasonable investigation by respondent's trial counsel. All counsel had to do was talk to him. But counsel failed to do even that.

Admittedly, respondent's trial counsel testified that he did not call Carroll as a witness at trial because he thought Carroll's testimony could have been harmful to respondent's case (PCR Tr. 42-43, 47). But how could he make such a determination without ever speaking to Carroll?

Counsel must exercise reasonable diligence and may be found ineffective if he performs inadequate investigation. Cravens v. State, 50 S.W.3d 290, 295 (Mo. App. S.D. 2001). Counsel has a duty to make reasonable professional investigations or to make a reasonable decision that makes particular

investigations unnecessary. Alhamoud v. State, 91 S.W.3d 119, 121 (Mo. App. E.D. 2002). Respondent's trial counsel did neither. He simply did not even bother to speak to Kyle Carroll before trial.

Moreover, claiming trial strategy cannot explain away counsel's failure. "An argument based on trial strategy or tactics is appropriate only if counsel is fully informed of facts which should have been discovered by investigation." Perkey v. State, 68 S.W.3d 547, 552 (Mo. App W.D. 2001). Counsel lacked the information to make an informed judgment because of the inadequacy of his investigation; therefore, any argument as to trial strategy is inappropriate.

Furthermore, respondent was prejudiced by his trial counsel's ineffectiveness. Respondent was prejudiced by his counsel's failure to call Kyle Carroll as a witness because the jury did not hear his credible testimony that respondent was not involved in the robbery. The significance of Carroll's uncalled testimony is evident. If he were believed by the jury, Carroll's testimony would have led the jury to conclude that respondent was not involved in the robbery and respondent would not have been convicted. Trial counsel's failure to call Kyle Carroll to testify at trial left the jury with only Israel Freeland's testimony to consider.

Without Kyle Carroll, respondent essentially had no defense; with him, respondent had a defense to the charges if he were believed. Had the jury heard testimony from Kyle Carroll, a reasonable probability exists that the jury would have concluded that respondent was not involved in the robbery, and would have

acquitted respondent. Testimony from someone who had pled guilty to being one of the men who committed the robbery that respondent was not his accomplice in the robbery would have been critical to the jury's determination. The probability that the uncalled testimony would have swayed the jury cannot be ignored and meets the minimum standard of undermining confidence in the outcome. Edwards v. State, supra.

Had respondent's trial counsel called Kyle Carroll as a trial witness, there is a reasonable probability that the jury would have acquitted respondent on the charges. There is a substantial probability that correction of trial counsel's error would affect a different result.

Respondent has established that his trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney, and that he was prejudiced by his counsel's ineffectiveness. Had trial counsel called Kyle Carroll as a trial witness, there is a reasonable probability that the result of respondent's trial would have been different. Thus, the motion court did not clearly err in granting respondent's Rule 29.15 motion. The state's claim is without merit and should be denied.

## **CONCLUSION**

For the foregoing reasons, as set out in respondent's Arguments I and II, respondent respectfully requests that this Court affirm the motion court's granting of respondent's Rule 29.15 motion.

Respectfully submitted,

/s/ Mark Grothoff

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Mark A. Grothoff, MOBar #36612  
Attorney for Respondent  
1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
(573) 882-9855/FAX (573) 882-9468  
E-Mail: Mark.Grothoff@mspd.mo.gov

**Certificate of Compliance and Service**

I, Mark A. Grothoff, hereby certify to the following:

This substitute respondent's brief complies with the limitations contained in Supreme Court Rule 84.06(b). This substitute respondent's brief was completed using Microsoft Office Word, 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, this substitute respondent's brief contains 5,896 words, which does not exceed the 27,900 words allowed for a substitute respondent's brief.

On this 12<sup>th</sup> day of March, 2012, an electronic copy of the foregoing was sent through the Missouri e-Filing System to Daniel McPherson, Assistant Attorney General, at Dan.McPherson@ago.mo.gov.

/s/ Mark Grothoff

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Mark A. Grothoff